

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Gerald McCann and Judith McCann,

Plaintiffs,

v.

Macy's Inc., *et al.*,

Defendants.

Civil Action No.
3:18-cv-851 (PGS) (LHG)

**MEMORANDUM
AND ORDER**

SHERIDAN, U.S.D.J.

This matter comes before the Court on a motion filed by plaintiffs to amend the complaint and remand the action to state court. This slip-and-fall action was initially filed in New Jersey Superior Court, Middlesex County, and removed to federal court. Plaintiff now seeks to add as a defendant Lisa Kwiatkowski, a citizen of New Jersey, allegedly the store manager where the underlying incident occurred. (Certification of William Bock (Bock Cert.), ECF No. 7-1 at 23, 26). For the reasons stated herein, the Court, in its discretion, shall deny plaintiff's motion for leave to amend.

BACKGROUND

On or about December 24, 2016, plaintiff Gerald McCann¹ slipped and fell while at Macy's East Brunswick in the Brunswick Square Mall. (Second Amended Complaint (SAC) at ¶ 1-3). Plaintiff alleges defendants negligently "owned, leased, maintained managed, controlled, operated,

¹ In addition – and unrelated to this motion – Mr. McCann's wife Judith McCann is also a plaintiff, alleging she has been "deprived of the services, society and consortium of plaintiff Gerald T. McCann." (SAC at 4). For simplicity, the Court shall refer to "plaintiff" rather than "plaintiffs" herein.

inspected, constructed, and/or designed said premises so as to cause a hazardous condition to exist and cause Plaintiff to slip and fall,” (SAC at ¶ 4), and “failed to warn plaintiff” of same, (SAC at ¶ 4). Plaintiff alleges he: suffered “permanent injuries” and present and future “great pain”; “has and will in the future be required to expend large sums of money for the cure and treatment of his injuries” and “lost wages”; and “has been and will in the future be unable to pursue his normal daily activities as before.” (SAC at ¶ 5).

Plaintiffs are both citizens of New Jersey. (Notice of Removal (NOR), ECF No. 1 at ¶ 1). The amended complaint (which was removed) named the following defendants: Macy’s, Inc. (a Delaware corporation with its headquarters in Ohio); Brunswick Square Mall, LLC (a Delaware corporation with its headquarters in Indiana); WP Glimcher (an Indiana corporation with offices in Ohio); and Diversified Maintenance Systems, Inc. (a Delaware corporation with its principal place of business in Illinois). (NOR at ¶ 3-11). Upon information provided to the Court, plaintiff suffered a fractured elbow and his claim exceeds \$75,000. (See NOR at ¶ 16-17).

Plaintiff filed the initial complaint in state court in September 2017 and filed an amended complaint in November 2017. (NOR at ¶ 1, 12). On December 20, 2017, after amending the complaint once, plaintiff filed a motion for leave to file a second amended complaint adding Suzanne Palumbo, a citizen of New York, as a defendant upon the belief that she was the floor manager at Macy’s East Brunswick. (NOR at ¶ 13-15; Bock Cert. at ¶ 18 & Ex. E, F).

On January 22, 2018, defendant Diversified filed a notice of removal,² initiating the action in federal court. The state-court judge granted plaintiff’s motion for leave to amend the next day

² The Court recognizes there may be an issue as to whether Defendant’s removal was timely. *Compare* 28 U.S.C. § 1446(b)(3) (commencing the 30-day time period to file a notice of removal upon “receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may be first ascertained that the case is one which is or has become removable”) with *Stephens v. Gentillo*, 853 F. Supp. 2d 462, 471 (D.N.J. 2012) (questioning whether “deposition testimony constituted an ‘other paper’ on which Defendants could base removal”). However, any claim that removal was defective is moot because this motion was filed well over thirty days after removal. *See Ariel Land Owners v. Dring*, 351 fed 611, 613 (3d Cir. 2003); 28 U.S.C. § 1447(c).

but later vacated its order because the notice of removal was filed before the order. After the case was removed, plaintiff filed this motion for leave to amend the complaint to add Kwiatkowski and, as Kwiatkowski's joinder would divest the Court of diversity jurisdiction, also moved to remand. Defendants oppose the motion, arguing "that Plaintiff's application to amend and remove is done for the purposes of fraudulent joinder and that Ms. Kwiatkowski's addition to this lawsuit has no impact upon Plaintiff's liability or damages in the foregoing action." (Defendants' Brief, ECF No. 8-2, at 6-7).

JURISDICTION

This Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332(a) because the action is between citizens of different states and, although it is not alleged in any of the complaints, it appears from the notice of removal that the amount in controversy exceeds \$75,000. *See St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938) (holding that dismissal is not warranted unless it "appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount").

LEGAL ANALYSIS

Fed. R. Civ. P. 15(a) allows a party to amend its pleading by leave of court when justice so requires. Leave to amend pleadings is to be freely given. Fed. R. Civ. P. 15(a)(2); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962). The decision to grant leave to amend rests within the discretion of the court. *Foman*, 371 U.S. at 182. "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." 28 U.S.C. § 1447(e).

"Though not constitutionally required, the Supreme Court has long insisted, as a matter of statutory interpretation, that complete diversity between plaintiffs and all defendants exist." *Chem.*

Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co., 177 F.3d 210, 221 (3d Cir. 1999); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). Addition of a nondiverse party will defeat jurisdiction. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). When faced with an allegation that joinder after removal is made solely to defeat federal jurisdiction, courts in this district have looked to the test set forth in *Hensgens v. Deere & Co.*, 833 F.2d 1179 (5th Cir. 1987). *Hayden v. Westfield Ins. Co.*, 586 Fed. App'x 835, 840-41 (3d Cir. 2014); *Milko v. Int'l Flavors & Fragrances, Inc.*, No. 15-cv-8219(MAS)(TJB), 2016 WL 8709998 at 6-8 (D.N.J. July 29, 2016).

Under *Hensgens* the District Court “should use its discretion in deciding whether to allow [a nondiverse nonindispensable] party to be added.” 833 F.2d at 1182. The court should consider four factors: “the extent to which the purpose of the amendment is to defeat federal jurisdiction, whether plaintiff has been dilatory in asking for amendment, whether plaintiff will be significantly injured if amendment is not allowed, and any other factors bearing on the equities.” *Id.* “The district court, with input from the defendant, should then balance the equities and decide whether amendment should be permitted. If it permits the amendment of the nondiverse defendant, it then must remand to the state court. If the amendment is not allowed, the federal court maintains jurisdiction.” *Id.*

The parties and the Court agree that the second factor weighs in favor of remand because plaintiff filed this motion within two weeks of Macy’s identifying her. (See Defendants’ Brief, ECF No. 8-2, at 7; Plaintiff’s Reply, ECF No. 9, at 3). However, the remaining factors weigh against permitting the amendment.

As to the first factor, plaintiff has set forth no detailed allegations of Kwiatkowski’s liability. He merely states, in a conclusory manner, that she, along with the other defendants, “negligently owned, leased, maintained, managed, controlled, operated, inspected, constructed,

and/or designed” the premises. (Second Amended Complaint, ECF No. 7-9, at ¶ 3). The Court recognizes that under New Jersey law, “[w]here an injury is caused by the negligence of a servant acting in the line of his employment, a joint action may be maintained against the servant and the master, or against either of them separately.” *Walker v. Choudhary*, 425 N.J. Super. 135, 148-49 (N.J. Super. Ct. App. Civ. 1966). However, plaintiff has set forth no separate and distinct cause of action against Kwiatkowski; the allegations arise out of the same transaction as to all defendants. Accordingly, plaintiff’s attempt to join a non-diverse party by setting forth bald-faced conclusions with neither detailed allegations nor a separate cause of action leads the Court to conclude that the first factor – the extent to which the purpose of the amendment is to destroy diversity jurisdiction – weighs against permitting amendment and remand.

The Court also finds that the third factor – the extent to which plaintiff will be significantly injured if amendment is not allowed – also weighs strongly against Plaintiffs’ amendment and remand. Obviously, Plaintiff has set forth claims against the “deep pocketed” defendants – Macy’s, Brunswick Square Mall, Diversified Maintenance Systems, and WP Glimcher; and adding Kwiatkowski is of little consequence to the value of the claim. Therefore, the Court finds no risk that plaintiff will be significantly harmed by proceeding in federal court without adding that individual.

Finally, the balance of equities also weighs against amendment here. By adding a defendant, the litigation will be delayed by the time it takes to file the amended complaint, service of the amended complaint, and the time for defendant to answer or otherwise respond. As stated, the parties from whom plaintiff will realistically recover financially are already named as defendants, there is no reason to incur further delay. See, *Hensgens v. Deere & Co.*, 833 F.2d 1179 (5th Cir. 1987).

ORDER

The Court has considered the arguments submitted by the parties and held oral argument on the matter. Accordingly, for the reasons stated herein and for good cause shown,

IT IS on this 17th day of January, 2019,

ORDERED that plaintiff's motion for leave to amend the complaint and to remand the matter to the Middlesex County Superior Court, (ECF No. 7), is **DENIED**.



PETER G. SHERIDAN, U.S.D.J.

O I INFORMATION DISCLOSURE STATEMENT
IN AN APPLICATION

JUN 28 2002 (Use several sheets if necessary)

Applicant: Euteneueret al.

Filing Date: December 13, 2001

Group Art Unit: 3761

3731

TRADEMARK OFFICE		DATE	SEARCHED	INDEXED	FILED	RECEIVED
WO 01/72205	10/04/01	WIPO				TC 3700 MAIL ROOM JUL 2 2001
WO 01/70326	09/27/01	WIPO				
WO 01/67989	09/20/01	WIPO				
EP 1 127 556 A2	08/29/01	EPO				
WO 01/60442	08/23/01	WIPO				
WO 01/58382	08/16/01	WIPO				
WO 01/52768	07/26/01	WIPO				
WO 01/49355	07/12/01	WIPO				
WO 01/49215	07/12/01	WIPO				
WO 01/49209	07/12/01	WIPO				
WO 01/49208	07/12/01	WIPO				
WO 01/47579	07/05/01	WIPO				
WO 01/43662	06/21/01	WIPO				
WO 01/35855	05/25/01	WIPO				
WO 01/26726	04/19/01	WIPO				
WO 01/21100	03/29/01	WIPO				
WO 01/21077	03/29/01	WIPO				
WO 01/15629	03/08/01	WIPO				
WO 01/10320	02/15/01	WIPO				
WO 01/08743	02/08/01	WIPO				
WO 01/08742	02/08/01	WIPO				
WO 01/08596	02/08/01	WIPO				
WO 01/08595	02/08/01	WIPO				
WO 01/05462	01/25/01	WIPO				
WO 00/67669	11/16/00	WIPO				
WO 00/67668	11/16/00	WIPO				
WO 00/67666	11/16/00	WIPO				
WO 00/67665	11/16/00	WIPO				
WO 00/67664	11/16/00	WIPO				
DE 199 16 162	10/26/00	Germany				English Abstract

EXAMINER:

DATE CONSIDERED:

1/1/04

EXAMINER: Initial if reference considered, whether or not citation is in conformance with MPEP 609; draw line through citation if not in conformance and not considered. Include copy of this form for next communication to the Applicant.

Applicant: Euteneuer et al.

Filing Date: December 13, 2001

Group Art Unit: 3701

JUN 20 2002
USPTO
PATENT & TRADEMARK OFFICE
INFORMATION DISCLOSURE STATEMENT
IN AN APPLICATION
(Use several sheets if necessary)

3731

WO 00/53120	09/14/00	WIPO	
WO 00/49970	08/31/00	WIPO	
WO 00/16705	03/30/00	WIPO	
WO 00/09054	02/24/00	WIPO	
WO 00/07655	02/17/00	WIPO	
WO 00/07521	02/17/00	WIPO	
WO 99/58068	11/18/99	WIPO	
WO 99/55236	11/04/99	WIPO	
WO 99/44542	09/10/99	WIPO	
WO 99/44510	09/10/99	WIPO	
EP 0 934 729	08/11/99	WIPO	
WO 99/42059	08/26/99	WIPO	
WO 99/40964	08/19/99	WIPO	
WO 99/30766	06/24/99	WIPO	
WO 99/25252	05/27/99	WIPO	
WO 99/23976	05/20/99	WIPO	
WO 99/22673	05/14/99	WIPO	
FR 2 768 326 A1	03/19/99	FR	English Abstract
WO 99/09895	03/04/99	WIPO	
WO 98/55175	12/10/98	WIPO	
WO 98/51237	11/19/98	WIPO	
WO 98/50103	11/12/98	WIPO	
WO 98/49952	11/12/98	WIPO	
WO 98/47447	10/29/98	WIPO	
WO 98/46297	10/22/98	WIPO	
WO 98/39053	09/11/98	WIPO	
WO 98/39046	09/11/98	WIPO	
WO 98/38929	09/11/98	WIPO	
WO 98/38920	09/11/98	WIPO	
WO 98/36786	08/27/98	WIPO	

TC 3700 MAIL ROOM
JUL - 2 2002

RECEIVED

EXAMINER:

DATE CONSIDERED:

1/2/04

EXAMINER: Initial if reference considered, whether or not citation is in conformance with MPEP 609; draw line through citation if not in conformance and not considered. Include copy of this form for next communication to the Applicant.

INFORMATION DISCLOSURE STATEMENT IN AN APPLICATION <small>Use several sheets if necessary)</small>	Docket Number: 1001.1517101	Application Number: 10/017,877
	Applicant: Euteneuer et al.	
	Filing Date: December 13, 2001	Group Art Unit: 3761

JUN 28 2002

PATENT & TRADEMARK OFFICE

RECEIVED

JUN 28 2002

MAIL ROOM

12/04

WO 98/34673	08/13/98	WIPO	
WO 98/33443	08/06/98	WIPO	
EP 0 852 132 A1	07/08/98	EPO	English Abstract
WO 98/23322	06/04/98	WIPO	
WO 98/02084	01/22/98	WIPO	
WO 98/02112	01/22/98	WIPO	English Abstract
WO 97/42879	11/20/97	WIPO	
WO 97/27808	08/07/97	WIPO	
EP 0 784 988 A1	07/23/97	EPO	
WO 97/17100	05/15/97	WIPO	
EP 0 771 549 A2	05/07/97	EPO	English Abstract
EP 0 759 287 A1	02/26/97	EPO	English Abstract
EP 0 748 046 A1	11/20/96	EPO	
WO 96/33677	10/31/96	WIPO	
EP 0 737 450 A1	10/16/96	EPO	
WO 96/23441	08/08/96	WIPO	
JP 8-187294 A	07/23/96	JP	English Abstract
WO 96/19941	07/04/96	WIPO	
WO 96/10375	04/11/96	WIPO	
WO 96/01591	01/25/96	WIPO	
EP 0 696 447 A2	02/14/96	EP	
EP 0 686 379 A2	06/02/95	EP	
EP 0 655 228 A1	11/22/94	EPO	English Abstract
WO 94/24946	11/10/94	WIPO	
WO 94/14389	07/07/94	WIPO	English Abstract
EP 0 533 511 A1	03/24/93	EP	
FR 2 694 687	08/12/92	FR	English Abstract
FR 2 666 980	03/27/92	FR	English Abstract
WO 92/03097	03/05/92	WIPO	
EP 0 472 368 A2	02/26/92	EP	

EXAMINER: <i>newell</i>	DATE CONSIDERED: <i>12/04</i>
EXAMINER: Initial if reference considered, whether or not citation is in conformance with MPEP 609; draw line through citation if not in conformance and not considered. Include copy of this form for next communication to the Applicant.	

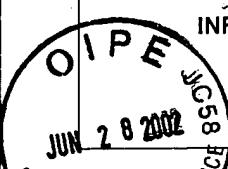
INFORMATION DISCLOSURE STATEMENT
IN AN APPLICATION

(Use several sheets if necessary)

Applicant: Euteneuer et al.

Filing Date: December 13, 2001

Group Art Unit: 3761



EP 0 472 334 A1	02/26/92	EP	3100 MAIL ROOM	SEARCHED
EP 0 437 121 B1	07/17/91	EP		
EP 0 427 429 A2	05/15/91	EPO		
EP 0 411 118 A1	02/06/91	EP		
DE 40 30 998 A1	10/1990	Germany		
FR 2 643 250 A1	08/24/90	FR		English Abstract
WO 88/09683	12/15/88	WIPO		
EP 0 293 605 A1	12/07/88	EP		
FR 2 580 504	10/24/86	FR		English Abstract
EP 0 200 688	11/05/86	EP		
DE 34 17 738	11/14/85	DE		Translation
SU 764684	09/25/80	U.S.S.R.		Translation
UK 2 020 557 B	01/19/83	UK		
DE 28 21 048	07/17/80	DE		

OTHER ART (Including Author, Title, Date, Pertinent Pages, Etc.)

	"Atherosclerotic Disease of the Aortic Arch as a Risk Factor of Recurrent Ischemic Stroke," The New England Journal of Medicine, pp. 1216-1221 (May 1996)
	"Endovascular Grafts, Stents Drive Interventional Radiology Growth," Cardiovascular Device Update, 2(3):1-12 (March 1996)
	"Protruding Atheromas in the Thoracic Aortic and Systemic Embolization," pp. 423-427 American College of Physicians (1991)
	"Recognition and Embolic Potential of Intraaortic Atherosclerotic Debris," American College of Cardiology (January 1991)
	Cragg, Andrew et al., "A New Percutaneous Vena Cava Filter," AJR, 141:601-604 (September 1983)
	Cragg, Andrew et al., "Nonsurgical Placement of Arterial Endoprostheses: A New Technique Using Nitinol Wire," AJR, pp. 261-263 (April 1983)
	Diethrich et al., "Percutaneous Techniques for Endoluminal Carotid Interventions," J. Endovasc. Surg., 3:182-202 (1996)
	Fadali, A. Moneim, "A filtering device for the prevention of particulate embolization during the course of cardiac surgery," Surgery, 64(3):634-639 (September 1968)

EXAMINER:

DATE CONSIDERED:

01/02/03

EXAMINER: Initial if reference considered, whether or not citation is in conformance with MPEP 609; draw line through citation if not in conformance and not considered. Include copy of this form for next communication to the Applicant.

INFORMATION DISCLOSURE STATEMENT
IN AN APPLICATION

(Use several sheets if necessary)

Applicant: Euteneuer et al.

Filing Date: December 13, 2001

Group Art Unit: 3761 3731

	Haissaguerre et al., "Spontaneous Initiation of Atrial Fibrillation by Ectopic Beats Originating in the Pulmonary Veins," <u>The New England Journal of Medicine</u> , 339(10):659-666 (September 1988)
	Jordan, Jr. et al., "Microemboli Detected by Transcranial Doppler Monitoring...," <u>Cardiovascular Surgery</u> , 7(1):33-38 (January 1999)
	Lesh, "Can Catheter Ablation Cure Atrial Fibrillation?" <u>ACC Current Journal Review</u> , pp. 38-40 (September/October 1997)
	Lund et al., "Long-Term Patency of Ductus Arteriosus After Balloon Dilation: an Experimental Study," <u>Laboratory Investigation</u> , 69(4):772-774 (April 1984)
	Marache et al., "Percutaneous Transluminal Venous Angioplasty...," <u>American Heart Journal</u> , 125(2 Pt 1):362-366 (February 1993)
	Mazur et al., "Directional Atherectomy with the Omnicath™: A Unique New Catheter System," <u>Catheterization and Cardiovascular Diagnosis</u> , 31:17-84 (1994)
	Moussa, MD, Issaam "Stents Don't Require Systemic Anticoagulation... But the Technique (and Results) Must be Optimal," <u>Journal of Invasive Cardiol.</u> , 8(E):3E-7E (1996)
	Nakanishi et al., "Catheter Intervention to Venous System Using Expandable Metallic Stents," <u>Rinsho Kyoju Geka</u> , 14(2):English Abstract Only (April 1994)
	Onal et al., "Primary Stenting for Complex Atherosclerotic Plaques in Aortic and Iliac Stenoses," <u>Cardiovascular & Interventional Radiology</u> , 21(5):386-392 (1998)
	Theron et al., "New Triple Coaxial Catheter System for Carotid Angioplasty with Cerebral Protection," <u>American Journal of Neuroradiology</u> , 11:869-874 (1990)
	Tunick et al., "Protruding atherosclerotic plaque in the aortic arch of patients with systemic embolization: A new finding seen by transesophageal echocardiography," <u>American Heart Journal</u> 120(3):658-660 (September 1990)
	Waksman et al., "Distal Embolization is Common After Directional Atherectomy...," <u>American Heart Journal</u> , 129(3):430-435 (1995)
	Wholey, Mark H. et al., PTA and Stents in the Treatment of Extracranial Circulation," <u>The Journal of Invasive Cardiology</u> , 8(E):25E-30E (1996)

JUL - 2 2002
TC 3700 MAIL ROOM

RECEIVED

EXAMINER: <i>Greenglass</i>	DATE CONSIDERED: <i>1/2/04</i>
EXAMINER: Initial if reference considered, whether or not citation is in conformance with MPEP 609; draw line through citation if not in conformance and not considered. Include copy of this form for next communication to the Applicant.	